LIBRARY
SUPREME COURT, U. S.

FILED
DEC 13 1973
CLERK

No. 73-676

In the Supreme Court of the United States

OCTOBER TERM, 1973

INDUSTRIAL LIFE INSURANCE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-676

INDUSTRIAL LIFE INSURANCE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner urges here, as it did in the courts below, that during its taxable years 1963, 1964 and 1965, it was taxable as a "life insurance company" within the meaning of Section 801(a) of the Internal Revenue Code of 1954; that it was not liable for the accumulated earnings tax imposed by Section 531 of the Code; and that it was entitled to capital gains treatment on the sale of certain real estate lots owned by it because it held such lots as "capital assets," as defined in Section 1221 of the Code. Both the district court (Pet. App. 170-181) and the court of appeals (Pet. App. 183-184) decided each of these factual issues adversely to petitioner.

Petitioner does not allege that the decision below is in conflict with that of any other circuit. To the contrary, it simply restates the arguments with respect to these factual determinations which were correctly rejected by both courts below.

1. Petitioner was not a life insurance company within the meaning of Section 801(a) of the Code, because during the taxable years in issue its primary and predominant business activity was not the issuance insurance contracts.[1] See Treas. Reg. § 1.801-3(a); *Bowers* v. *Lawyers Mortgage Co.*, 285 U.S. 182. The evidence showed (Pet. App. 170-171, 175, 178) that premium income in each of the years in issue was exceedingly small when compared to business income from other sources. Moreover, a substantial portion of the small premium income was attributable to policies on the lives of petitioner's officers (Pet. App. 170-171).

2. The evidence also amply justified the conclusion that petitioner was liable for the Section 531 accumulated earnings tax. The district court found that petitioner had accumulated earnings of $232,765.41 (1963), $260,018.06 (1964), and $269,099.38 (1965), and that it had shown no reasonable business need for this accumulation (Pet. App. 172). Although petitioner argues (Pet. 57-70) that it had a reasonable business need for these accumulations in the sum of $600,000 because of capitalization requirements under state law, the district court noted (Pet. App. 172) that it was exempted from those requirements. Similarly, the court

[1] Petitioner errs in suggesting (Pet. 31-52) that the Act of March 9, 1945, 59 Stat. 33 (15 U.S.C. 1011 *et seq.* (commonly known as the McCarran Act)) altered this test. See *Modern Life & Accident Ins. Co.* v. *Commissioner*, 420 F. 2d 36 (C.A. 7).

of appeals observed (Pet. App. 184, note) that "the record fails to show that earnings were accumulated as part of a plan to meet threatened pending legislation." It is therefore beyond question that petitioner permitted its earnings and profits to accumulate beyond its reasonable business needs, and failed to meet its burden under Section 533(a) of the Code to demonstrate that the purpose behind such accumulation was not the avoiding of income tax upon its shareholders.

3. Finally, the record supports the conclusion of both courts below that petitioner "was engaged in the sale of lots in the ordinary course of its trade or business during the years 1963 and 1964" and was therefore taxable on the gains from these sales at ordinary income rates under Section 1221(1) of the Code. The district court found that the real estate had been originally purchased for investment purposes, but that petitioner thereafter changed its purpose, and that this change was evidenced by petitioner's subdivision of part of the tract, its numerous sales of individual lots prior to the taxable years in issue, and the fact that petitioner's primary income during the taxable years 1963 and 1964 arose from the sale of lots (Pet. App. 171-172).[2]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

---

[2] Petitioner errs in suggesting (Pet. 74-80) that the district court improperly failed to make a specific finding that it held the real estate "*primarily* for sale to customers in the ordinary course of his trade or business." There was no need for such a finding because the evidence showed that petitioner held the real estate for only one purpose during the years in issue. Cf. *Malat* v. *Riddell*, 383 U.S. 569.